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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1377

NATHAN WECHSLER, GEORGE FAIGEN, SEYMOUR FAIGEN, SIGMUND GOLDBLATT, ROBERT C. COTTEN, JR., and A. CLAIBORNE LEIGH, *Petitioners,*

v.

UNITED STATES OF AMERICA, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY FOR PETITIONERS

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CITATIONS

CASES: Page

Abbate v. *United States*, 247 F.2d 410 (5 Cir. 1957) ... 14
Bruton v. *United States*, No. 705, this Term 10, 11
Chapman v. *California*, 386 U.S. 18 16
Collenger v. *United States*, 50 F.2d 345 (7 Cir. 1931) .. 13
DeLuna v. *United States*, 308 F.2d 140 (5 Cir. 1952) .. 12
Delli Paoli v. *United States*, 352 U.S. 232 14
Ingram v. *United States*, 360 U.S. 672 ..... 3, 6
Lutwak v. *United States*, 344 U.S. 604 14
Marshall v. *United States*, 355 F.2d 999 (9 Cir. 1966), *cert. den.*, 385 U.S. 815 8
McIntosh v. *United States*, 385 F.2d 274 (8 Cir. 1967) .. 7
Miranda v. *Arizona*, 384 U.S. 436 13
Stirone v. *United States*, 361 U.S. 212 8
United States v. *Burke*, 278 F. Supp. 711 (E.D. Pa. 1968), appeal pending, *sub nom. United States* v. *Nardello*, No. 1277, this Term 4
United States v. *Chase*, 372 F.2d 453 (4 Cir. 1967) 14
United States v. *Echeles*, 352 F.2d 892 (7 Cir. 1965) ... 11
United States v. *Gradwell*, 243 U.S. 476 7
United States v. *Kubacki*, 237 F. Supp. 638 (E.D. Pa. 1965) 7
United States v. *Nardello*, No. 1277, this Term 4, 5
United States v. *Wingo*, (6 Cir. September 1967) withdrawn and decided *en banc* (April 12, 1968) 2
Washington v. *Texas*, 388 U.S. 14 .....11, 12
Yokely v. *United States*, 327 F.2d 455 (9 Cir. 1956) ... 14

STATUTES:

18 U.S.C. § 1952 ..... *passim*
28 U.S.C. § 2111 15

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REPLY FOR PETITIONERS

I

Petitioners were convicted of a conspiracy to violate 18 U.S.C. § 1952(a)(3), which makes it a federal crime to use an interstate facility "with intent to * * * promote, manage, establish, [or] carry on * * * any unlawful activity * * *." § 1952(b)(2) defines "unlawful activity" as "extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States." The court of appeals affirmed petitioners' conviction on the basis that, under this statute, the "state crime serves 'only as a background

identification of the unlawful activities' " (Pet. App. 3a), quoting with approval an opinion of the Sixth Circuit in *United States* v. *Wingo,* which the Government now advises (Br. in Op. 9, ftn. 7) has been withdrawn.[1]

In urging this Court to deny review of that holding, the Government misstates it. The court of appeals did not decide "that a conspiracy to violate Section 1952 *may be evidenced by* the use of an interstate facility during the period of the bribery scheme" (Br. in Op. 9, emphasis supplied); it held as a matter of "statutory construction" (Pet. App. 6a) that a conspiracy to violate § 1952(a)(3) may be established even if the use of interstate facilities was unaccompanied by an *intent* to violate state law, and that the substantive offense is not to be "equated with, and limited by, the state law" (Pet. App. 2a). The first question presented by the Petition in this case is whether this view of

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[1] In the court of appeals the Government relied heavily on the original *Wingo* opinion. When the court below affirmed petitioners' convictions, it accepted and relied upon the Government's construction of the Sixth Circuit's holding (Pet. App. 3a), unaware that that court had withdrawn its opinion two months before. Petitioners, who were likewise unaware of the Sixth Circuit's action, filed a petition for rehearing in which they urged, *inter alia,* that *Wingo* did not support the majority's conclusion (Petition for Rehearing 3, 4, 5). If the court below had known that the principal authority on which it relied had been removed, it might well have granted the petition for rehearing to consider the statutory issue and thereupon reversed the convictions. We submit that under these circumstances the Government, which was a party both to *Wingo* and this case, was obliged to advise the court that *Wingo* had been withdrawn. Although we urge this Court to resolve the statutory question by granting certiorari, thereby mooting the problem caused by the Government's silence, failing that, the proper administration of justice requires that the court of appeals be given the opportunity to consider the question in the light of the knowledge that *Wingo* is no longer a precedent.

the statute, which differs from that of the Fifth, Sixth, Seventh, Eighth and Ninth Circuits (Pet. 17), is correct. The Government not only recasts that question in terms which have no relation to it or to this case (Br. in Op. 2), but avoids coming to grips with our argument by misreading it and disclaiming disagreement with an argument we do not make.[2]

After convincing the court below to adopt its position "that the accomplishment of the final rezoning * * * is properly within the term 'bribery' as it is found in 18 U.S.C. § 1952" (Br. for Appellee 7), the Government seeks to avoid review through another device. This time it substitutes the words "bribery scheme" (Br. in Op. 6, 7, 9) for the words "conspiracy to secure an illegal zoning" (Pet. 12-13). Of course, we cite no case to support the position that a prosecution cannot be maintained under § 1952(a)(3) if the minimal conduct necessary to sustain a state bribery conviction "occurs prior to the use of interstate facilities in furtherance of the bribery scheme" (Br. in Op. 7)—that is not our position. Petitioners' argument is that since the object of the conspiracy charged here is a violation of the substantive offense proscribed by § 1952(a)(3) (see Pet. App. 1a, 8a-9a), and since "[c]onspiracy to commit a particular substantive offense cannot exist without *at least* the degree of criminal intent necessary for the substantive offense itself," *Ingram* v. *United States,* 360 U.S. 672, 678, it was impossible for any alleged conspirator to have used an interstate facility after § 1952(a)(3) was enacted *with intent to promote*

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[2] We do not contend merely "that Section 1952 *incorporates* the elements of bribery under State law * * * " (Br. in Op. 7); we insist that it also "circumscribes" the federal offense in terms of state law (Pet. 15, 17, 18), and that it requires an *intent* to violate state law (Pet. 15, 17-18).

bribery under Virginia law, since, prior to the enactment of § 1952(a)(3), that bribe had already been accomplished.

The Government is driven to these artifices because its position in this case is contrary to its own prior representations to this Court (see Pet. 16, 20-21, text and ftn. 27) and because there is also pending its own request for review of a lower court decision which passes on the relationship between § 1952(a)(3) and state law—*United States* v. *Nardello,* No. 1277, this Term.

The Government endeavors mightily to get its cake in *Nardello* and to keep it in this case. But we submit that both logic and sound judicial administration require that these cases be decided together. The relationship between the two issues clearly appears from the opinion which the Government seeks review in *Nardello*:

> "[T]he House and Senate hearings consistently show what the words of the statute themselves attest: that the incorporation of state definitions for the crimes of extortion and bribery was enacted with the expectation that their content would differ substantively from state to state. The term 'extortion' in 18 U.S.C. § 1952 was thus intended to track closely the legal understanding under state law, and was not designed to be more generic in scope. * * * The Pennsylvania definition of extortion, therefore, is strictly controlling in the instant case."[3]

In other words, the *Nardello* court held that § 1952 requires the federal courts to look to state law (1) to

[3] *United States* v. *Burke,* 278 F. Supp. 711, 712 (E.D. Pa. 1968), appeal pending, *sub nom. United States* v. *Nardello,* No. 1277, this term.

determine the scope of the "unlawful activity" and (2) to characterize that unlawful activity as "extortion, bribery, or arson." In *Nardello,* the Government challenges the second ruling. In order to decide the question raised by the Government, the Court must consider the same materials—the language of §§ 1952(a)(3) and (b)(2), as well as their legislative history—which control the question in this case. Indeed, the issue posed by the Government attains significance only if the scope of the "unlawful activity" is governed by state law as we contend. As the Government itself said in its jurisdictional statement in *Nardello* and reiterates here (Br. in Op. 7), the statute withholds "federal penalties for conduct which is not an offense at all under state law." If "that does not mean that the reach of the federal statute is to be circumscribed by the events to which each State determines its local prosecution should attach" (*id.*) what does it mean? Unless the state determines that "its local prosecution should attach" thereto, "conduct is not an offense at all under state law." The short of it is that in this case the trial court allowed the jury to impose "federal penalties for conduct which is not an offense at all under state law," an unlawful zoning (Pet. 12-13); and the court of appeals expressly held that the federal offense is *not* to be "equated with, and limited by, the state law of bribery" (Pet. App. 2a).

That holding would merit review by the Court even if *Nardello* were not pending. While the Government urges that the statutory question "is less likely to recur" because it "was occasioned *primarily* by the fact that Section 1952 was enacted after the [alleged] bribery scheme had been initiated" (Br. in Op. 9, emphasis supplied), it is a curious notion that the reviewability of a statutory interpretation should be *dimin-*

ished by the circumstance that it gives an *ex post facto* effect to the statute. In any event, the erroneous construction had *four* additional adverse consequences on petitioners (Pet. 16, ftn. 23) including the trial court's refusal to charge the jury (as petitioners requested) that it could convict on the conspiracy charge only if it found that a defendant had, after September 13, 1961, an intent to establish or carry on bribery in violation of Virginia law (Pet. 12).[4] Moreover, once it is acknowledged that the statutory question does control the outcome of this case—a fact which the court of appeals made crystal clear (Pet. App. 1a-2a, 6a) and which the Government apparently does not dispute—its importance does not depend on how it arose in this case, but on how widely it will affect *other* cases.

The problems of vagueness inherent in the court of appeals' construction (Pet. 20-21) are in no way alleviated by the Government's artful rephrasing in its Opposition. If § 1952 is not "a precise reflection of the various State bribery statutes" (Br. in Op. 7), how imprecise may the reflection be? If " the reach of the statute" is not circumscribed by the events to which each State determines its local prosecution should attach" (*id.*) by what events, if any, shall it be circumscribed? If a state "interest" in certain activities is sufficient to warrant prosecution under § 1952 (Br. in Op. 8), how is that interest to be determined, other than by the state law itself, which Congress adopted in its definition of "unlawful activity"?

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[4] If, as we insist, "unlawful activity" means "bribery * * * in violation of the laws of the State in which committed," this instruction was required under *Ingram* v. *United States*, 360 U.S. 672, 678.

And quite aside from the due process problems which are created by the Government's attempt to set § 1952 at large—problems which it previously represented to be nonexistent precisely because state law governs (see cases cited at Pet. 20-21, ftn. 27)—the balance between state and federal law which Congress preserved in § 1952 is destroyed. Cast off from the moorings of state law, and without the aid of a congressional definition, the courts would be required to create a new federal common law of "extortion, bribery, and arson", "aiding the enforcement of" (Br. in Op. 9), but not limited by, state law. The federal courts have historically eschewed such a role. *United States* v. *Gradwell*, 243 U.S. 476, 485.

As to all this, the Government says nothing; our assertion that the consequence of the decision below "is to inject uncertainty into all future prosecutions under § 1952" (Pet. 15) is unanswerable.

Although our position rests squarely on the language of § 1952(b)(2) (see particularly Pet. 18, *et seq.*), the Government's discussion makes no reference to that section. Instead, when it speaks of "the language which Congress used in Section 1952" it refers primarily to subsections (a)(1) and (a)(2), which have nothing to do with this case (Br. in Op. 7-8, ftn. 6).[5]

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[5] *United States* v. *Kubacki*, 237 F. Supp. 638, 642-643 (E.D. Pa. 1965), upon which the Government relies (Br. in Op. 8, 9), in no way supports its position. *Kubacki* involved distribution of the proceeds of a bribe under § 1952(a)(1) where, although the bribe had been completed under state law prior to the enactment of § 1952, the distribution of the proceeds occurred thereafter. The distribution of the proceeds—the precise offense for which the Kubacki defendants had been indicted (see 237 F. Supp. at 639-640, n. 2)—occurred subsequent to § 1952's enactment. *McIntosh* v. *United States*, 385 F. 2d 274 (8 Cir. 1967), also cited by the

And when it quotes subsection (a)(3), under which petitioners were prosecuted, it commits an unpardonable sin of advocacy—it deletes (Br. in Op. 8) the critical language whose meaning is in issue—"unlawful activity"—and substitutes therefor "[bribery]", omitting the essential qualification "in violation of the laws of the State in which committed." We earnestly submit that an argument which takes this form should not foreclose plenary review of a statutory construction which the United States can defend only by excising the controlling statutory language.

II

The Government argues that petitioners' claim that they were convicted of a crime not charged in the indictment "is essentially a rephrasing of the argument" on the proper construction of § 1952(a)(3). But even if the court below properly departed from the plain language of § 1952, the Constitution entitled petitioners to be tried on the basis of the indictment *as written*. Thus, *Stirone* v. *United States*, 361 U.S. 212, is controlling even under the Government's view that that case applies only where the trial judge admits "proof of an element of the offense which was not alleged in the indictment" (Br. in Op. 11, ftn. 8). For, although the indictment cannot fairly be read as charging a con-

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Government (Br. in Op. 9), actually supports our position. That case follows *Marshall* v. *United States*, 355 F. 2d 999 (9 Cir. 1966), *cert. denied*, 385 U.S. 815 (Pet. 17), in holding that "although the 'unlawful activity' of extortion must be one *defined and proscribed by state law*, it need not be an accomplished fact to sustain a conviction under Section 1952 * * *." 358 F. 2d at 277 (emphasis supplied).

spiracy engaging the use of interstate facilities to promote an illegal zoning (Pet. 22-23), the trial court admitted over objection prejudicial evidence of acts and statements occurring long after the termination of the alleged bribe conspiracy on the erroneous theory that it was in furtherance of an illegal zoning (*e.g.*, G. Ex. 25, CA 469; G. Ex. 26, CA 472; G. Ex. 19, CA 462-463). Moreover, the Government reads *Stirone* too narrowly. That case holds that where an indictment is drawn in narrow terms the evidence to support the conviction must be in the same narrow terms "even though it be assumed that under an indictment drawn in general terms a conviction might rest upon a showing" in broader terms. 361 U.S. 212 at 218. Accordingly, even if the statute would have permitted petitioners' trial and conviction on the theory that the "unlawful activity" was an illegal zoning accomplished by means of bribery as the trial judge charged (CA 359-360, 369, 373), the indictment did not. See Pet. 22-23.

The Government says also that the switch from the Court's pre-trial construction of the indictment to its post-trial instructions to the jury is merely a "difference in the form of expression" and not "a ground for reversal" (Br. in Op. 10). Of course, every instruction to a jury and every ruling by a court is a "form of expression"; such differences have been held to be "ground for reversal" in many cases, including those cited at Pet. 22-26. Here, likewise, "form" *does* matter. The difference between the court's original construction of the indictment and that on which it allowed the case to go to the jury goes to the heart of

the case.[6] While the Government is able to say with the benefit of hindsight that "the indictment clearly foreshadowed" what issue would be "presented to the jury" (Br. in Op. 11), petitioners were entitled in preparing for trial to rely on the construction of the indictment which they received from the trial court. While the "essential issue presented to the jury" was that described by the Government (Br. in Op. 11), the case would never had gone to the jury at all if the trial court had adhered to its original construction (Pet. 5-6) whereunder "the essential issue" was whether the Government proved—as it represented it would—that Leigh's personal check to Cotten dated September 9, 1961 was actually delivered on or after September 13, 1961.

III

In opposing review of the ruling which required petitioners other than Leigh to go to trial jointly with him, thereby depriving them of his testimony (Pet. 7, 26-27), the Government cites *Bruton* v. *United States*, No. 705, this Term, for the proposition that "Joint

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[6] This precise objection was made in the clearest possible terms: "I just want to say that, in view of the state of the record, as I read it and I understand it, that the defendant that I represent, if he goes to this Jury, is going to the Jury on a crime which was never charged in this indictment * * *, and if it was charged in the indictment, it is a crime which is not a crime under any Federal law that I read." (CA 347-348). The assertion that the relevance of the switch "was argued by petitioners (see *e.g.*, CA 282-287) *only with respect to the issue of law whether the government's proof established a crime embraced within the federal statute*" (Br. in Op. 11, emphasis supplied), is thus belied by the record.

trials of co-conspirators are clearly desirable" (Br. in Op. 12). The essential point, however, is that *Bruton* decided that the preservation of the constitutional rights of defendants is even more "desirable". Just as *Bruton* was entitled to a separate trial in order to protect his rights under the "Confrontation" clause, petitioners were entitled to a separate trial to guarantee their rights under the "Compulsory Attendance" clause. *Washington* v. *Texas*, 388 U.S. 14, 19. *Bruton*, decided after the present petition was filed, thus presents an additional and compelling ground for granting review of the severance issue.

Even before *Bruton* was decided, one court of appeals had held that severance must be granted in circumstances which do not differ in principle from those in this case. For, while the Government urges that the trial court was entitled to consider the "likelihood that Leigh might elect to exercise his privilege against self-incrimination when called to the stand" (Br. in Op. 12), *United States* v. *Echeles*, 352 F. 2d 892 (7 Cir. 1965), squarely foreclosed that speculation.[7]

Moreover, the Government misstates both the basis of the trial court's ruling and the record on which it was made. Contrary to the Government's contention (Br. in Op. 12, ftn. 9), the expected substance of Leigh's testimony (the date of delivery and *purpose* of Leigh's check to Cotten) was disclosed by Mr. Sha-

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[7] That court said: "With regard to the question of whether or not Arrington would claim the privilege if he were called as a witness during a trial of Echeles alone—a trial held subsequent to his own—we can only say that such question was not properly the Government's to interpose. Speculation about what Arrington might do at a later Echeles trial undoubtedly would be a matter of some concern to Echeles, but he should not be foreclosed of the possibility that Arrington would testify in his behalf merely because that eventuality was not a certainty." 352 F. 2d at 898.

piro, counsel for petitioner Goldblatt (CA 96-97). The trial court refused (CA 97-98) to permit Mr. Shapiro to elicit the same representations from Mr. Batchelor (Leigh's counsel) in open court. It is also untrue that the trial "court denied the motion [for severance] without prejudice to reconsideration if Leigh himself were to state that he was prepared to give exculpatory testimony on behalf of the other defendants" (Br. in Op. 12). The condition imposed was far more severe: Counsel was required to obtain "an exculpatory statement [from Leigh] helping everybody else in this case and * * * *taking the onus himself*" (CA 96, emphasis supplied). Only a confession by Leigh would have sufficed even if all defendants, including Leigh, were innocent. The trial court was thus prepared to honor "the right to present a defense", *Washington* v. *Texas,* 388 U.S. 14, 19, only on condition that Leigh surrender both his right to defend the accusation against himself and his privilege against self-incrimination. This was not "the exercise of * * * discretion" (Br. in Op. 12), but the application of an unconstitutional standard. "In short, for each of the defendants to see the face of Justice they must be tried separately". *DeLuna* v. *United States,* 308 F. 2d 140, 155 (5 Cir. 1962). The question is simply whether, by indicting defendants jointly, the prosecution may impose on one or more of them the loss of constitutional rights. Both because of its constitutional dimensions, and its widespread importance to the administration of criminal justice in the federal courts, that question should be answered now.

IV

While conceding that the trial court's failure to limit petitioner Wechsler's post-conspiracy declarations was error, the Government contends it "was harmless in

the context of this case" (Br. in Op. 15) because these "hearsay statements were exculpatory" (Br. in Op. 16, ftn. 13). But "[i]f a statement made were truly exculpatory, it would, of course, never be used by the prosecution. In fact, statements merely intended to be exculpatory by the defendant are often used * * * to demonstrate untruths in the statement given under interrogation and thus to prove guilt by implication." *Miranda* v. *Arizona,* 384 U.S. 436, 477. Since this is precisely what the prosecution sought to and did, in fact, accomplish through Agent Hutnick's testimony,[8] such statements were "incriminating in any meaningful sense of the word." *Miranda, supra.* Despite the Government's contrary assertion (Br. in Op. 16), the error was not cured by the charge. See *Collenger* v. *United States,* 50 F. 2d 345, 349-350 (7 Cir. 1931),

[8] The defense was that petitioners Wechsler, Goldblatt and the Faigens had hired Somers, a lawyer, to assist them in connection with their zoning application for $15,000 plus $500 for a brochure, and that that fee was eventually settled for $5,500, contingent upon favorable action by the Supervisors (Pet. 11). Yet, according to Evangelist, a Government agent, petitioner Wechsler initially said that Somers was Peachey's lawyer not petitioners' (CA 235). Later, Wechsler told McElroy, another Government agent, that (1) petitioners had obtained Somers' services to do some *survey* work (CA 155) and (2) he had no idea why Somers had given Leigh a check for $5,500 (CA 157). When Agent Hutnick took the stand he said Wechsler told him that (3) petitioners had hired Somers to do a *study* on trailer parks (CA 243) and (4) Somers "must have had" a separate deal with Leigh on the original $15,000 (CA 245). This testimony showed not only that Wechsler had given Evangelist and Hutnick two different stories, but also that Wechsler had given Hutnick a different story from that he had given McElroy. When, in addition, Hutnick testified that petitioner Goldblatt told him that he Goldblatt, did not think Somers had anything to do with the zoning (CA 247-248), at least two of the four developer defendants had given inconsistent explanations of Somers' zoning role to three different Government agents.

where the charge was almost identical to the one in this case (compare 50 F. 2d at 349 with CA 371-372); *Abbate* v. *United States*, 247 F. 2d 410, 413 (5 Cir. 1957); *Yokely* v. *United States*, 237 F. 2d 455, 458 (9 Cir. 1956).

Moreover, although the Government now asserts that the court below was "justified in treating the error as harmless" (Br. in Op. 16), that court did no such thing nor did the Government there concede that it was error, albeit "harmless". In fact, contrary to what it says now (Br. in Op. 16, ftn. 11), the Government successfully convinced that court that "the factor that distinguishes this case from those cited by appellants"[9] was that "*all the statements of these defendants, as testified to by the Agent, were totally exculpatory*" (Br. for Appellee 53, emphasis in original). This is the only basis upon which the court below could have held this issue to be "without merit" (Pet. App. 7a) since it reversed the same Judge for the same instruction in regard to *inculpatory* statements only months before. *United States* v. *Chase*, 372 F. 2d 453, 460 (4 Cir. 1967). Surely, if the court below had thought the instructions, although erroneous, were "harmless", it would have said so, just as it did in regard to the DeMik issue (Pet. App. 7a).

Since this Court cannot know whether the court below even regarded the trial court's instructions to be error, it cannot know whether that court scrutinized the record to determine whether such error was harmless or whether, if it did so, it applied the proper standard. Accordingly, the Government's belated concession that the trial court erred (Br. in Op. 15) entitles peti-

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[9] *E.g.*, *Lutwak* v. *United States*, 344 U.S. 604; *Delli Paoli* v. *United States*, 352 U.S. 232.

tioners to scrutiny of the record either by this Court on certiorari or by the court of appeals after summary remand.

V

In arguing that the exclusion of DeMik's testimony "did not affect petitioners' substantial rights" (Br. in Op. 13-14), the Government forgets what it had said earlier—that the "essential issue presented to the jury * * * was whether the $5,500 check to Somers was in payment for legal services or was intended to be disbursed to various county supervisors in exchange for a favorable vote" (Br. in Op. 11). The district court's ruling foreclosed petitioners from placing before the jury evidence which would have shown the innocence of that payment more forcefully than any which the trial court did admit, for it would have been established that petitioners had been advised by their attorney to make that payment. Moreover, even if the court below were right and that evidence "could have added [little] to the jury's knowledge" (Pet. App. 7a), petitioners were entitled to place in the strongest light their explanation of the transaction for which the Government sought to convict them. Contrary to the court of appeals' view, an error in the exclusion of such evidence cannot be cured by spelling out a party's "contentions * * * in the charge to the jury" (Pet. App. 7a). Indeed, *in the absence of evidence to support them,* such contentions are most likely to induce the jury to discredit the defense, to accept the Government's version of the transaction, and to convict. On any standard, therefore, the application of 28 U.S. § 2111 below was untenable. But the more important issue—and the one to which the Petition for Certiorari was addressed (Pet. 30-31)—is whether error can be treated as harm-

less unless the court can "declare a belief that it was harmless beyond a reasonable doubt". *Chapman* v. *California,* 386 U.S. 18, 24. The Government does not contend that this issue is unworthy of review. It does not express a position on how this issue is to be resolved. It does not mention it at all. Inevitably, that question will repeatedly arise in the federal courts until it is settled, and since petitioners' trial was also marred by the *admitted* error on the post-conspiracy declarations, this case is an especially appropriate vehicle for its resolution.[10]

CONCLUSION

By reason of the foregoing, the petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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[10] Since the Government did not confess error on the *Lutwak* point in the court below, the cumulative effect of the two errors on the fairness of petitioners' trial has never been considered by any court.